

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL, HUMAN RIGHTS & JUDICIAL REVIEW
DIVISION JUDICIAL REVIEW APPLICATION
NO.06 OF 2019

REPUBLIC.....APPLICANT

-VERSUS-

COUNTY EXECUTIVE COMMITTEE MEMBER,
FINANCE & ECONOMIC PLANNING,
COUNTY GOVERNMENT OF MOMBASA.....1ST RESPONDENT
COUNTY GOVERNMENT OF MOMBASA.....2ND RESPONDENT
ex parte;

ROBINSON ONYANGO MALOMBO
T/A ROBINSON ONYANGO & COMPANY ADVOCATES

RULING

1. The application before court is a motion dated 29 April 2025 expressed to be filed under section 5(1) of the Judicature Act, cap. 8. The applicant prays for the order:

“1. That the County Executive Member Finance & Economic Planning- County Government of Mombasa be committed to Civil jail (Shimo la Tewa Prison) and detained in person for a term of six (6) months or such period as this Honourable Court will deem fit or all be fined and imprisoned for Contempt of this Honourable Court Orders made on 28th September, 2020.”

2. The affidavit in support of the application has been sworn by the applicant, Robinson Onyango Malombo Esq, who is also an advocate of this Honourable Court.
3. According to Mr. Malombo, he once acted for the defunct Municipal Council of Mombasa which was succeeded by the County Government of Mombasa in several cases. His accumulated fees for legal services rendered and for which he eventually obtained an order of Mandamus compelling the County Government of Mombasa to pay was “over Kshs. 1 billion.” However, parties agreed that he would forego the sum of Kshs. 800,000,000/= and be paid Kshs. 120,000,000/=. A consent judgment to this effect was recorded in court on 28 September 2020.
4. The consent order is said to have provided, *inter alia*, that:
 - "(viii) That interest of 4% on the instalment shall be surcharged on each and every instalment where the County Government of Mombasa fails to pay monthly instalment due herein.***
 - (ix) That interest of 4% on the instalment amount of kshs 120,000,000/= everymonth where the County Government of Mombasa fails to honour this Consent in its entirety."***
5. Following the consent order, the 2nd Respondent proceeded to pay the instalments of Kshs. 5,000,000/= but outside the agreed timelines. According to the consent order, the payments ought to have been cleared by July, 2022.

6. Due to the persistent defaults in payment of the instalments, the applicant was compelled to renegotiate the terms of the previous consent so that he could be paid the balance of Ksh 46,520,000,00.00 (exclusive of interest).
7. On 19 September, 2023, another Consent was recorded according to which the applicant was to be paid the balance of Ksh 46,520,000.00 by way of monthly instalments of Kshs. 5,000,000.00 commencing 30 October, 2023, and on or before the 30th day of each succeeding months until payment in full. The Consent further provided that in default of any one instalment parties would revert to the terms of the consent order dated 28 September, 2020. It is this particular order that the applicants are seeking to enforce in these contempt proceedings.
8. According to the applicant, “the 2nd respondent's failure to pay the instalments due is as a result of impunity and/or incompetence of the 1st Respondent.” The applicant contends that despite being fully aware of the consent orders, the 1st respondent deliberately refused to pay the outstanding sum hence this application.
9. The respondent opposed the application and Mr. Swaleh Mwalizuma swore a replying affidavit to that effect. He has introduced himself as the 2nd respondent’s attorney. According to Mwalizuma, consent and of 28 September 2020 was entered during “their predecessor's tenure” and therefore, “they shall not respond into the nitty-gritties” that led to the

consent. In any event, the respondents were not informed of all the liabilities that had been incurred when their predecessors were in office.

10. The respondents only became aware of the consent dated 28 September 2020 when the applicant filed the application dated 7 August 2023 citing the County Executive Committee Member Finance for contempt for not complying with the consent order dated 28 September 2020.

11. The respondents negotiated with the applicant afresh and subsequently reached the consent of 19 September 2023 which was adopted as the order of the court. Out of the Kshs. 120,000,000/= due to the applicant, the respondents' predecessors had paid Kshs. 73,480,000/= leaving a balance of Kshs. 46,520,000/=.

12. The respondents duly settled the outstanding debt by monthly instalments of Kshs. 5,000,000/=. They have, however, admitted that certain instalments were delayed ***“due to various bureaucracies including approval from the Controller of Budget which is a requirement under the law and this Honourable Court is privy to the same as the procedure for the Judiciary is similar as well”***.

13. In particular, the final settlement sums of Kshs. 5,000,000/= remitted on 24 September 2024 was delayed due to the normal budgetary cycle which the respondents had no control over. That notwithstanding, some instalments such as the instalment of the month of May 2024 were paid

earlier than the scheduled date. The applicant was aware of the reasons for the delays whenever there were delays.

14. According to the respondents the sum of Kshs. 46,660,000/= was paid to the applicant, Kshs. 80,000/= having been paid over and above the amount due. In total the applicant has been paid the sum of Kshs. 145,174,755.45 since the year 2017. It is the respondent's case that there is no sum due pending for payment.

15. The consent adopted as the order of the court on 28 September 2020 read as follows:

“Having heard and having considered the Submissions by Mr. Gamba counsel for the Applicant herein and Mr. Tajbhai counsel for Respondents herein, and having seen the Consent herein dated 11th August, 2020 signed by counsel for both parties herein;

IT IS HEREBY ORDERED BY CONSENT:

i. That the applicant to be paid by the County Government of Mombasa the sum of Kshs. 120,000,000/= (One Hundred and Twenty Million Kenya Shillings) all inclusive.

ii. That the applicant herein shall adopt this consent in the matters enumerated herein below but not limited being Judicial Review applications and/or Miscellaneous Applications as against the County Government of Mombasa with no orders as to costs.

- 1. Mombasa Judicial Review No. 29 of 2016**
- 2. Mombasa Judicial Review No. 30 of 2016**
- 3. Mombasa Judicial Review No. 31 of 2016**
- 4. Mombasa Judicial Review No. 32 of 2016**
- 5. Mombasa Judicial Review No. 33 of 2016**
- 6. Mombasa Judicial Review No. 34 of 2016**
- 7. Mombasa Judicial Review No. 35 of 2016**
- 8. Mombasa Judicial Review No. 36 of 2016**
- 9. Mombasa Judicial Review No. 39 of 2016**
- 10. Mombasa Judicial Review No. 48 of 2016**
- 11. Mombasa Judicial Review No. 50 of 2016**
- 12. Mombasa Judicial Review No. 86 of 2016**
- 13. Mombasa Judicial Review No. 87 of 2016**
- 14. Mombasa Judicial Review No. 45 of 2017**
- 15. Mombasa Judicial Review No. 6 of 2019**
- 16. Mombasa Judicial Review No. 7 of 2019**
- 17. Mombasa Judicial Review No. 8 of 2019**
- 18. Mombasa Judicial Review No. 9 of 2019**
- 19. Mombasa Judicial Review No. 63 of 2019**
- 20. Mombasa Judicial Review No. 64 of 2019**
- 21. Mombasa Judicial Review No. 65 of 2019**
- 22. Mombasa HCC Misc. No. 187 of 2015**

23. Mombasa HCC Misc. No. 208 of 2015

24. Mombasa HCC Misc. No. 284 of 2015

25. Mombasa HCC Misc. No. 341 of 2016

26. Mombasa HCC Misc. No. 375 of 2016

27. Mombasa HCC Misc. No. 420 of 2016

28. Mombasa HCC Misc. No. 458 of 2016

29. Mombasa HCC Misc. No. 459 of 2016

30. Mombasa HCC Misc. No. 460 of 2016

31. Mombasa HCC Misc. No. 492 of 2016

32. Mombasa HCC Misc. No. 513 of 2016

33. Mombasa HCC Misc. No. 549 of 2016

34. Mombasa HCC Misc. No. 253 of 2019

35. Mombasa HCC Misc. No. 263 of 2019

iii. That with subject to the above, the applicant shall have no claim whatsoever as against the County Government of Mombasa with regards to legal fees emanating from during the times of the Municipality of Mombasa and prior to this Consent being executed.

iv. That upon endorsing this Consent as an order of the court, the Applicant shall not pursue execution of warrants against any of the Respondents within 30 days from the date hereof and during

the pendency of the Consent provided the consent is being adhered to by the County Government of Mombasa.

v. That the applicant shall be paid the 1st instalment of Kshs 12,000,000/= (Kenya Shillings Twelve Million Only) immediately upon the County Government of Mombasa receiving its 1st National Disbursement.

vi. That the applicant shall thereafter be paid a 2nd instalment of Kshs 12,000,000/= after 30 days of the 1st instalment.

vii. That the appellant shall thereafter be paid monthly instalments of Kshs 5,000,000/= on the 15th day of every succeeding month until payment in full.

viii. That interest of 4% on the instalment shall be surcharged on each and every instalment where the County Government of Mombasa fails to pay the monthly instalment due herein.

ix. That interest of 4% on the instalment amount of Kshs 120,000,000/= every month where the County Government of Mombasa fails to honor this consent in its entirety.

x. That the applicant shall withdraw the Constitutional Petition No. 38 of 2020 as against the 1st and 2nd respondent in that Constitutional Petition No. 38 of 2020 with no orders as to costs once the 1st instalment of Kshs. 12,000,000/= is paid. (Kenya Shillings twelve Million Only).

*Given under my hand and seal of this Honourable Court this 28th
day of September, 2020.*

Signed

**DEPUTY REGISTRAR
HIGH COURT OF KENYA
MOMBASA**

Issued at Mombasa this 28th day of September 2020”

16. In summary, the applicant was to be paid Kshs. 120,000,000/= in full settlement of his fees for services rendered in the enumerated matters including the instant suit. Apparently, this order was not fully complied with, in the sense that only part of the agreed sum was paid to the applicant and even then, the instalments were not remitted within the agreed timeline in order to clear the balance, which according to the applicant, was Kshs. 46, 520,000/=, at the time material to this application, a second consent was entered into.

17. The consent was entered and adopted as the order of court on 19 September 2023; in its parts, pertinent to this application, the consent read as follows:

“It is hereby ordered by consent:

1. That the Applicant be paid by the County Government of Mombasa the sum of Kshs. 46,520,000/= (Forty Six Million Five

Hundred and Twenty Thousand) only being the balance of the amount due and owing to the Applicant in terms of the Consent entered into on the 28th September 2020.

2. That the said sum of Kshs. 46,520,000/= be paid to the Applicant by way of equal monthly instalments(sic) of Kshs. 5,000,000/= (Five Million) only commencing on the 30th October 2023 and on or before the 30th day of each succeeding month until payment in full.

3. That in default of any one installment (sic) parties SHALL revert to the terms of the Consent Order entered into on the 28th September 2020.”

18. The applicant has acknowledged that he was eventually paid the sum of Kshs. 120,080,000/= and all he is now seeking is the payment of Kshs. 100,902,400/= on account of accrued interest as a result of late remittances of the agreed monthly instalments. The respondents are alleged to be in contempt of court for failure to pay this amount.

19. It has not been demonstrated how the applicant arrived at the figure of Kshs. 100,902,400/= as the interest due. In any event, having been paid all the agreed instalments, I doubt whether it can be said that there is any amount due to the applicant on account of interest.

20. According to the consent of 28 September 2020, “the interest of 4% on the instalment shall be surcharged on each and every instalment where

the County Government of Mombasa fails to pay the monthly instalment due herein.”

21. I understand this to mean that if there is any outstanding instalment to be paid, it would attract “interest of 4%”. It is not clear from this clause, whether the interest accrued daily, monthly or yearly. As noted, it is not clear how the applicant arrived at the figure of Kshs. 100,902,400/= as the outstanding interest.

22. According to Rule 81.4 (1) (b) of the Civil Procedure (Amendment No. 3) Rules 2020 of England which apply in this country by virtue of section 5 of the Judicature Act, in a contempt application, the order alleged to have been breached must be clear in its terms, leaving nothing to ambiguity.

23. Be that as it may, my understanding of clause (vii) of the consent of 28 September 2020 is that if all the monthly instalments were paid, there is no basis for demanding interest. And if the applicant’s case is that the instalments were paid but outside the period within which they ought to have been paid, no explanation has been given why he continued receiving late payments contrary to the consent.

24. My reading of the applicant’s conduct is that he waived his rights to insist on payments of instalment as agreed or that he acquiesced to payments of the instalments in a manner other than the agreed mode of settlement. It would be inequitable for the applicant to receive all the instalments due and thereafter go back to the consent and demand for interest for the

reason that he was not paid as agreed. In short, the applicant is estopped from insisting on payment of the interest when by his conduct, he accepted payments later than the scheduled dates.

25. It has been held in **Habib Bank Ltd v. Habib Bank AG [1981] 1 WLR 1265** that estoppel by conduct is essentially the application of a rule by which justice is done where the circumstances of the conduct and behaviour of the party to an action are such that it would be wholly inequitable that he should be entitled to succeed in the proceeding. (per Whitford, J at 1287D)

26. Besides estoppel by conduct, it was also held in this case that a defence of acquiescence is available where a person is aware that his rights are being breached and is in a position to complain about the breach, but does not protest or do anything about it. He simply stands by and the longer he does nothing, the stronger the evidence that he has assented to what has been done or to what is still being done. This concept has been explained in Halsbury's Laws of England Vol 16(2) para 909 as follows:

"The term 'acquiescence' is, however, properly used where a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed; a person

so standing by cannot afterwards be heard to complain of the act. In that sense the doctrine of acquiescence may be defined as quiescence under such circumstances that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct, the principle of estoppel by representation applying both at law and in equity, although its application to acquiescence is equitable. The estoppel rests upon the circumstances that the person standing by in effect makes a misrepresentation as to a fact, namely, his own title; a mere statement that he intends to do something, for example to abandon his right, is not enough. Furthermore, equitable estoppel is not applied in favour of a volunteer."

27. Thus, a claimant's failure to protest or to do anything, leads the other party, who might have stopped doing what he was doing if he had received an earlier objection, to believe that there is no objection to what he has done, or, where the inactivity of the claimant goes on for a long time, to continuing to do what he has been doing. There comes a point at which the court can hold that it is too late to assist the claimant's enforcement of his rights, because it is unreasonable and unjust for him to complain about their infringement. The longer the time that passes before the claimant takes action, the stronger the evidence of acquiescence in the continuing activities of the defendants and the greater the difficulty in

turning the clock back to the time when the claimant first had an opportunity to protest and seek redress for the infringement of his rights.

(See Brooker & Anor v. Fisher, [2008] EMLR 13 (Apr 4, 2008))

28. I consider the applicant as both having acquiesced in the respondents' late remittances and having waived his claim to interest in the late remittances of the instalments. For these reasons, I do not find any merit in the applicant's application. It is hereby dismissed with costs.

Signed, dated and delivered on 15 May 2026

Ngaah Jairus
JUDGE